

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

77-4030

UNITED STATES COURT OF APPEALS

For the Second Circuit

PETER NOLASCO CIEGO,

Petitioner

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

PETITION FOR REVIEW

BOARD OF IMMIGRATION APPEALS

PETITIONER'S BRIEF

Edelman & Aronowitz
Attorneys for Petitioner
225 Broadway
New York, New York 10007

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P/S

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Statutes Involved

Section 101(b)(1) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. 1101(b)(1)]:

(b) As used in subchapters I and II of this chapter --

(1) The term "child" means an unmarried person under twenty-one years of age who is --

(A) a legitimate child; or

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(F) a child, under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care which will be provided the child if admitted to the United States and who has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and his spouse who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse who have complied with the preadoption requirements, if any, of the child's proposed residence: Provided, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

Section 101(f) of the Immigration and Nationality Act of 1952,
as amended [8 U.S.C. 1101(f)]:

Sec. 101. (f) For the purposes of this chapter --

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was --

- (1) a habitual drunkard;
- (2) one who during such period has committed adultery;
- (3) a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 212(a) of this Act; or paragraphs (9), (10), and (23) of section 212(a), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;
- (4) one whose income is derived principally from illegal gambling activities;
- (5) one who has been convicted of two or more gambling offenses committed during such period;
- (6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;
- (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;
- (8) one who at any time has been convicted of the crime of murder.

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

Section 241(a)(2) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. 1251(a)(2)]:

Sec. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who---

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

Section 244(a) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. 1254(a)]:

Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and --

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of

section 241(a); has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Section 244(e) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. 1254(e)]:

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

Section 249 of the Immigration and Nationality Act of 1952,
as amended [8 U.S.C. 1259]:

Sec. 249. A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he --

(a) entered the United States prior to June 30, 1948;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character;
and

(d) is not ineligible to citizenship.

Regulation Involved

Title 8, Code of Federal Regulations, Section 287.4(a):

287.4 Subpoena.

(a) Who may issue --

(1) Prior to commencement of proceedings. Except as provided in §335.11 of this chapter, subpoena requiring the attendance of witnesses or the production of documentary evidence, or both, may be issued by a district director upon his own volition prior to the commencement of a proceeding.

(2) Subsequent to commencement of proceedings. In any proceeding under this chapter, other than under Part 335 of this chapter, and in any proceeding ancillary thereto, a district director or a special inquiry officer having jurisdiction over the matter may, upon his own volition or upon application of a trial attorney, the alien, or other party affected, issue subpoenas requiring the attendance of witnesses or for the production of books, papers and other documentary evidence, or both. A party applying for a subpoena shall be required, as a condition precedent to its issuance, to state in writing or at the proceeding what he expects to prove by such witnesses or documentary evidence, and to show affirmatively that he has made diligent effort without success to produce the same. Upon being satisfied that a witness will not appear and testify or produce documentary evidence and that his evidence is essential, the district director or special inquiry officer shall issue a subpoena. If the witness is at a distance of more than 100 miles from the place of hearing, the subpoena shall provide for the witness' appearance at the field office nearest to him to respond to oral or written interrogatories, unless the Service indicates that there is no objection to bringing the witness the distance required to enable him to testify in person in the proceeding.

Statement of the Issues Presented for Review

1. Was the Board of Immigration Appeals correct in finding the petitioner was unable to satisfy the good moral character requirement for suspension of deportation?

2. Is the petitioner statutorily eligible for suspension of deportation and/or voluntary departure?

3. Did the Board of Immigration Appeals abuse its powers by denying suspension of deportation and voluntary departure?

4. Was the petitioner competent to testify at his deportation hearing in view of his past history of mental instability and did the Immigration Judge act properly in compelling the petitioner's testimony?

5. Did the Board of Immigration Appeals act properly in upholding the refusal of the Immigration Judge to issue a subpoena for medical records?

Statement of the Case

The petitioner is a 43-year-old native and citizen of British Honduras (Belize) who first entered the United States in 1963. He was deported from this country on July 18, 1966, but reentered shortly thereafter. He subsequently departed from the United States in mid-December 1974, returning toward the end of January 1975. His entries into the United States were without inspection. The petitioner married in Guatemala in 1959, but separated from his wife in 1961. He has had no contact with her for sixteen years and has no knowledge of her present whereabouts or status. The petitioner has an illegitimate child, Lisa Annette Ciego, born in New York City, on May 15, 1966.

The petitioner was the victim of a mugging in New York City in 1968, which left him severely injured (appendix, p.32). Following that incident, he resided in a mental institution for approximately one and one-half years. Even recently, he has exhibited signs of aberrational behavior (appendix, p.31).

Deportation proceedings were conducted on May 28, 1976, and June 11, 1976. The petitioner applied for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act, and, in the alternative, for voluntary departure pursuant to Section 244(e) of the Act.

The Immigration Judge denied the application for suspension of deportation on the grounds that the petitioner did not satisfy the physical presence and hardship requirements of Section 244(a)(1) of the Act. He denied voluntary departure because of the previous deportation. During the deportation proceedings the Immigration Judge was requested to issue a subpoena for medical records. He refused. Despite the unsettled question of the respondent's mental fitness and competency to testify, the Immigration Judge compelled his testimony over the objections of counsel.

The decision of the Immigration Judge was appealed to the Board of Immigration Appeals. The Board was furnished with a copy of its own decision in the matter of Dell Fat Git (appendix, pp. 9-11) pertaining to the question of physical presence. The Board declined to consider the question of physical presence, declined to consider the question of hardship, but raised an issue of adultery and denied suspension of deportation on statutory grounds because of an alleged inability to establish good moral character. The Board upheld the refusal of the Immigration Judge to issue the requested subpoena, made no reference to the petitioner's mental condition or to his forced testimony, and went on to deny the requested relief as a matter of discretion.

Argument

Point I

THE FINDING BY THE BOARD OF IMMIGRATION APPEALS THAT THE PETITIONER IS STATUTORILY INELIGIBLE FOR SUSPENSION OF DEPORTATION BECAUSE HE CANNOT ESTABLISH GOOD MORAL CHARACTER IS WRONG AS A MATTER OF LAW.

One of the statutory requirements for suspension of deportation is that an applicant establish good moral character for the seven years preceding the application for such relief. The Board of Immigration Appeals (the "Board") determined that the petitioner is precluded from establishing good moral character because of alleged adulterous conduct, citing Section 101(f)(2) of the Immigration and Nationality Act (the "Act"). The Board wrote:

At the hearing, the respondent admitted having married in 1959 in Guatemala. Although he claims to have been separated from his wife since 1961, he stated that he never legally terminated the marriage, by divorce or otherwise. In view of the fact that he also admits having fathered an illegitimate child in the United States, we find that this constitutes adultery and he is therefore precluded from establishing good moral character by section 101(f)(2) of the Act.

The pertinent part of Section 101(f) is as follows:

Sec. 101. (f) For the purposes of this chapter --

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was --

(2) one who during such period has committed adultery;

(emphasis supplied)

Section 244(a)(1) of the Act, moreover, requires the establishment of good moral character for the seven years preceding the date of an application for suspension of deportation.

The record reflects that the petitioner's application for suspension of deportation was formally filed on May 28, 1976. The application, bearing the Immigration and Naturalization Service receipt stamp, is reproduced as pages 47 - 50 of the joint appendix.

Accordingly, the period for which good moral character must be established commenced May 28, 1969. With the foregoing in mind, let us examine the alleged adultery of the petitioner.

The issue arose as a result of the petitioner's answer to question 16 of the application for suspension of deportation. The question posed was: "16. I have _____ children." The response was "no legitimate". The reason for

that response is that under our immigration law the illegitimate offspring of a male is not deemed a "child" within the definition of Section 101(b)(1) of the Act.

The questioning of the petitioner at his deportation hearing regarding his illegitimate child was perfunctory (appendix, pp.28-29) and the issue of adultery was not raised by the Immigration Judge in his decision denying relief.

Only the Board seized upon adultery as a ground for the denial of relief. Unfortunately, the Board acted without ascertaining all of the relevant facts.

It has never been established that any act of adultery whatsoever has been committed by this petitioner. He has had no contact with his wife since 1961. He does not know whether or not she is alive. He does not know whether or not she obtained a divorce or annulment. He has no idea where she may be living. But even if the petitioner's wife were still alive and the marriage not terminated, no act of adultery has ever been alleged that could possibly justify a finding of statutory ineligibility for lack of good moral character in this matter.

The fact is that the child in question, Lisa Annette Ciego, was born on May 15, 1966, in Brooklyn, New York. That being the case, conception must have occurred almost four years prior to the commencement of the period for which good moral character must be established.

There is not one scintilla of evidence that any adultery has been committed by the petitioner subsequent to May 28, 1969. There is no evidence that the petitioner has been anything other than a person of good moral character for all of the period commencing May 28, 1969. The record contains a good conduct certificate issued by the New York City Police Department on March 23, 1976 (appendix, p.56).

The finding by the Board that the petitioner does not satisfy the good moral character requirement of the statute providing for suspension of deportation is erroneous as a matter of law.

Point II

THE PETITIONER IS STATUTORILY ELIGIBLE FOR SUSPENSION OF DEPORTATION PURSUANT TO SECTION 244(a)(1) OF THE ACT AND FOR VOLUNTARY DEPARTURE PURSUANT TO SECTION 244(e) OF THE ACT.

The petitioner, during his deportation hearings, conceded deportability under Section 241(a)(2) of the Act [8 U.S.C. 1251(a)], as an alien who entered the United States without inspection. (Text of statute herein at page 4 , see also order to show cause at appendix, p.59, and additional charge of deportability at appendix, p.60.) He is not and has never been charged with being deportable under any of the paragraphs listed in Section 244(a)(2) of the Act. It is, therefore, necessary for the petitioner to establish seven years of continuous physical presence, good moral character during those seven years, extreme hardship in the event of deportation, and the unavailability of an immigrant visa in order to be statutorily eligible for suspension of deportation. The requirements for voluntary departure are less stringent. There is no requirement for any special period of physical presence or for any degree of hardship to be established. In addition, good moral character must only be shown for a period of five years.

The Board's finding that the petitioner cannot satisfy the statutory requirement of good moral character has already

been argued against.

The Immigration Judge found that the petitioner does not satisfy the statutory requirement of seven years of physical presence for suspension of deportation. The petitioner, however, claims that he has been physically present in the United States for the purposes of suspension of deportation since September 1966. The Immigration Judge held that his five-week absence between December 1974 and January 1975, interrupted the period of physical presence, citing Matter of Barragan, 13 I&N Dec. 759.

This matter is distinguishable from Barragan. In that case, the subject alien had twice been apprehended and left for short periods under voluntary departure rather than submit to deportation proceedings. The Board held that these were "enforced" departures and considered such departures "two clear breaks in the required continuity of physical presence in the United States." It is noted that the departure of the petitioner herein was not enforced in any way.

On appeal, the Board's attention was directed to its own decision of October 3, 1968, in the Matter of Dell Fat Git aka Yee Fat Git (unpublished decision, reproduced in appendix, pp. 9-11). Citing Rosenberg v. Fleuti, 375 U.S. 449, Wadman v. Immigration and Naturalization Service, 329 F.2d 812 (9th Cir., 1964), Git Foo Wong v. Immigration and Naturalization Service,

359 F.2d 151 (9th Cir., 1966), Toon Ming Wong v. Immigration and Naturalization Service, 363 F.2d 234 (9th Cir., 1966) and Matter of Wong, Int. Dec. 1745 (May 10, 1967), the Board concluded that Git's absence from the United States for a period of three months and twenty-two days (an absence three times as lengthy as the petitioner) did not preclude his compliance with the physical presence requirement of Section 244(a)(1) of the Act.

It is noted that in its decision of December 20, 1976, the Board specifically chose not to reach the question of physical presence.

The Immigration Judge further found that the petitioner had not established the requisite degree of hardship for suspension of deportation.

It was pointed out to the Board, on appeal, that the petitioner, because of mental and physical disabilities, is able to only marginally function in our society. It was noted that his mental and physical problems appear to have arisen from his having been assaulted in New York City. It should be obvious that removal of this man from the United States, after more than ten years of residence here, to a depressed area like Belize would result in the most greivous hardship to him.

It is noted that in its decision of December 20, 1976, the Board did not discuss the question of hardship.

The petitioner is ineligible to receive an immigrant visa as he does not have any relatives in the United States with standing to petition the Immigration and Naturalization Service to grant a quota preference classification to him and he cannot possibly comply with the labor certification requirements for a visa based upon an occupational preference or nonpreference classification.

The only bar to statutory eligibility for suspension of deportation raised by the Board was an alleged lack of good moral character. That hurdle has already been overcome.

The Immigration Judge concluded that the petitioner was not eligible for voluntary departure, as alternative relief, because he had previously been deported from the United States. There is no authority whatsoever for the proposition that there is a statutory bar to voluntary departure because of a prior deportation. The Board, although denying voluntary departure as a matter of discretion, did not support the Immigration Judge's holding that the petitioner was barred from a grant of voluntary departure.

Accordingly, the petitioner is statutorily eligible for both suspension of deportation and voluntary departure.

Point III

THE BOARD OF IMMIGRATION APPEALS ABUSED ITS DISCRETION WHEN IT UPHELD THE DENIAL OF SUSPENSION OF DEPORTATION AND VOLUNTARY DEPARTURE.

Evidence has been presented that the petitioner is a person of good moral character and is without a record of criminal activity. The petitioner has suffered serious physical and mental injury while in the United States. Although of diminished mental capacity, he is gainfully employed and has never done anything to abuse the body politic of the United States.

Administrative decisions regarding applications for suspension of deportation which are granted are not generally published. A clearer picture of the standards required to permit the favorable exercise of discretion may be had by examining instances where such discretion has been refused. These include membership in subversive associations or participation in such activities, see: Kaloudis v. Shaughnessy, 180 F.2d 489 (2d Cir. 1950); James v. Shaughnessy, 202 F.2d 519 (2d Cir. 1953); Kimm v. Rosenberg, 363 U.S. 405 (1960) (refusal to answer question as to Communist Party membership justified denial), criminal activities or convictions, see: Weddeke v. Watkins, 166 F.2d 369 (2d Cir. 1948), cert. den. 333 U.S. 876;

Adel v. Shaughnessy, 183 F.2d 371 (2d Cir. 1950); In the Matter of P--, 5 I&N Dec. 651 (BIA, 1954).

It is clear that the adverse factors which led to a declination of the favorable exercise of discretion in the above matters are absent in the situation at hand.

In December 1976, the Domestic Council Committee on Illegal Aliens issued its preliminary report. The Committee was chaired by the Attorney General of the United States and consisted of the Secretaries of Agriculture, Commerce, Health, Education and Welfare, Labor, State, and Treasury, as well as the Director of the Office of Management and Budget, the Director of the Domestic Council, and the Special Assistant to the President for Public Liaison.

The major recommendations of the Committee appear at pages 240-244 of the preliminary report. Recommendations number two and five are relevant and are reproduced hereunder.

2. The executive branch should aggressively pursue the enactment of legislation which relates directly to the illegal alien question and which the executive branch has supported in the past. Such legislative actions include:

- (a) penalties for employers who knowingly hire aliens not authorized to work;
- (b) application of the preference system and foreign state limitations to Western Hemisphere immigration in a manner similar to that regulating Eastern Hemisphere immigration;

- (c) thorough revision of the labor certification provisions of the current law so that immigrants admitted for employment fall within prescribed quotas and individual certifications are eliminated;
- (d) advancement of the eligibility date for establishing a record of admission for lawful permanent residence from June 30, 1948 to July 1, 1968; and
- (e) increased penalties for persons who smuggle or facilitate illegal immigration.

(emphasis supplied)

5. The Committee is concerned about the large number of illegal aliens already in the United States. The Committee believes that massive deportation is both inhumane and impractical. It is expected that the enactment of the legislation described in recommendation #2 would permit some illegal aliens to adjust their status and cause many others to decide to leave the United States. In addition, the Committee should evaluate and develop other policy approaches toward those illegal aliens currently in the country.

The legislation contemplated by recommendation 2(d), refers to the possible amendment of Section 249 of the Act. (See page 6 herein) It is quite clear that should the eligibility date of that section be advanced in accordance with the recommendation of the Committee, the petitioner would readily qualify for adjustment of status. The physical presence requirement of Section 244(a)(1) would be replaced by a requirement of mere residence and there would not be any

need to establish hardship.

Since the recommendations of the Committee, chaired by the Attorney General, were made at just about the same time the Board acted to affirm the denial of suspension of deportation in the matter herein, it is extremely unlikely that the Board had the opportunity to consider them.

It is inconsistent for the Board, as agents of the Attorney General, in the absence of severely derogatory factors, to discretionarily deny suspension of deportation at the same time the Attorney General is on record as favoring adjustment of status under Section 249 of the Act for persons having residences in the United States since prior to July 1, 1968.

Point IV

THE FORCED TESTIMONY OF THE PETITIONER
AT HIS DEPORTATION HEARING REGARDING
ELIGIBILITY FOR DISCRETIONARY RELIEF
AND THE REFUSAL OF THE IMMIGRATION JUDGE
TO SUBPOENA MEDICAL RECORDS WAS A DENIAL
OF DUE PROCESS.

Following a physical assault upon his person in 1968, the petitioner was confined to a mental institution for almost one and one-half years. The petitioner has been unable to explain to counsel the causes of his committment and circumstances of his release. His recollections are vague and imprecise. His responses to questioning are often slow and labored with long pauses and delays. The precise qualify of his mental condition has never been ascertained by either counsel or the Immigration and Naturalization Service.

It has never been shown that the petitioner understands the nature of the proceedings brought against him. While this may not be an issue as to deportability (deportability having been conceded) it is relevant to the issue of discretionary relief.

The Immigration Judge erred in refusing to allow the mental condition of the petitioner to be ascertained prior to his being questioned regarding eligibility for discretionary relief from deportation. He evidently relied upon his own

evaluation of the petitioner's mental condition

To be legally incompetent, one need not be a violent madman nor babbling idiot, but test is purely whether he is insane or incompetent as compared with accepted normalcy, Dean v. United States, 150 F.Supp. 541.

When it is once established that a person has been legally adjudged mentally incompetent, the presumption of sanity no longer prevails and in its place there arises a presumption of lack of mental capacity and the burden of proving mental capacity devolves upon him who asserts it, Frame v. Hudspeth, 109 F.2d 356, reversed 309 U.S. 632. See also People of the State of Illinois ex rel Mazy v. Ragen, 55 F.Supp. 143, reversed 149 F.2d 948.

With respect to criminal matters, it has been decided that the test of a defendant's competency to stand trial is whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational as well as factual understanding of proceedings against him, and it is not enough that he is oriented to time and place and has some recollection of events, Dusky v. United States, 362 U.S. 402.

This same criterion should apply to applications for discretionary relief in deportation proceedings. As the Second

Circuit Court of Appeals stated in Tim Lok v. I.N.S., slip op. 55, at 1236 (2d Cir. Jan. 4, 1977):

Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties. We note at once, therefore, the settled doctrine that deportation statutes, if ambiguous, must be construed in favor of the alien ... (citation omitted)

Pursuant to 8 CFR 287.4(a)(2), the Immigration Judge was requested to subpoena pertinent medical records. It was desired to use such records in conjunction with a new psychiatric evaluation. (It is noted that the petitioner has exhibited markedly abnormal conduct as recently as 1974, during which year he was arrested in New York City for urinating in the subway - no charges pressed. This episode was described by the petitioner in his deportation hearing - appendix, p.31.)

The Immigration Judge, despite awareness of the petitioner's background of hospitalization compelled testimony on the requests for discretionary relief and refused to grant an adjournment so as to permit psychiatric evaluation. The Board upheld this decision writing:

Under 8 C.F.R. 287.4(a)(2) the party applying for a subpoena must affirmatively show, among other things, that the requested evidence is "essential" see Matter of Escobar, Interim Decision ____ (BIA October 18, 1976). Such a showing has not been made. Accordingly, the appeal will be dismissed.

It is noted that the Escobar decision was rendered

after the hearings conducted in the instant matter and that even unto the present time has still not been released by the Government Printing Office.

It is respectfully submitted that awareness of the mental state of an applicant for discretionary relief is "essential" to a proper and meaningful decision. The Immigration Judge has held that the petitioner made a meaningful departure from the United States in 1974. The mental state of the petitioner is certainly relevant to that issue as well as to the issue of hardship.

Neither the Immigration Judge nor the members of the Board are competent to psychiatrically evaluate this petitioner. The failure of the Immigration Judge to allow an adjournment for psychiatric evaluation was erroneous as was his refusal to assist in such evaluation by issuing a subpoena for medical records, as requested. The Board erred in upholding that aspect of the Immigration Judge's decision.

Conclusion

The petitioner is statutorily eligible for both suspension of deportation and voluntary departure in lieu of deportation. The Board of Immigration Appeals erred as a matter of law in finding that the petitioner could not comply with the good moral character requirements for such relief. The petitioner is a person of good moral character and merits the favorable exercise of discretion by the Attorney General and his agents with respect to his applications for relief from deportation. The petitioner is a person of diminished mental capacity. The Immigration Judge erred in compelling his testimony in the absence of evidence that the petitioner was competent to testify.

The Board did not consider the findings of the Immigration Judge with respect to statutory eligibility but, rather, raised a new issue, which has been seen to be erroneous.

The Board should be directed to grant the petitioner's application for suspension of deportation and prepare the report to Congress required by Section 244 of the Immigration and Nationality Act, as amended.

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COPY RECEIVED
Robert B. Fisk Jr.
UNITED STATES ATTORNEY
3/28/77
Marian F. Bryant